

DOCKET FILE COPY ORIGINAL

ROLAND, FOGEL, KOBLENZ & PETROCCIONE, LLP

ATTORNEYS AT LAW

1 COLUMBIA PLACE

ALBANY, NEW YORK 12207

KEITH J. ROLAND  
MARK L. KOBLENZ  
EMILIO A.F. PETROCCIONE

KEVIN M. COLWELL  
GEORGE A. ROLAND\*  
COUNSEL

\*ALSO ADMITTED TO FLORIDA BAR

EDMUND A. KOBLENZ  
1908-1972  
A. ABBA KOBLENZ  
1922-1979

TEL: (518) 434-8112

FAX: (518) 434-3232

RECEIVED  
ARLIT FERRENTINO  
USHER FOGEL  
OF COUNSEL

DEC 29 2004

December 29, 2004

Federal Communications Commission  
Office of Secretary

BY HAND DELIVERY

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
Office of the Secretary  
c/o Natek, Inc.  
236 Massachusetts Avenue, NE  
Suite 110  
Washington, D.C. 20002

Re: CC Docket No. 96-128: Petition of the Independent Payphone Association  
of New York, Inc. for an Order of Pre-emption and Declaratory Ruling

Dear Ms. Dortch:

On behalf of the Independent Payphone Association of New York, Inc.  
("IPANY"), enclosed please find an original and four (4) copies of the above referenced petition.  
IPANY also filed today a motion to consolidate this petition with the petitions for declaratory  
ruling filed by the Illinois Public Communications Association and the Southern Public  
Communications Association. In the event you have any questions, or require further  
information, please contact the undersigned.

Respectfully submitted,

*Keith J. Roland*

Keith J. Roland  
Counsel for the Independent Payphone Association  
of New York, Inc.

No. of Copies rec'd 014  
List ABCDE

Enclosures

ORIGINAL

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of )  
)  
Implementation of the Pay Telephone )  
Reclassification and Compensation Provisions )  
Of the Telecommunications Act of 1996 )  
)  
Petition of the Independent Payphone Association )  
of New York, Inc. to Pre-empt Determinations of )  
the State of New York Refusing to Implement the )  
Commission's Payphone Orders, and For a )  
Declaratory Ruling )

CC Docket No. 96-128

**RECEIVED**

DEC 29 2004

Federal Communications Commission  
Office of Secretary

**PETITION OF THE INDEPENDENT PAYPHONE ASSOCIATION  
OF NEW YORK, INC. FOR AN ORDER OF PRE-EMPTION AND  
DECLARATORY RULING**

Keith J. Roland  
Roland, Fogel, Koblenz &  
Petroccione, LLP  
One Columbia Place  
Albany, New York 12207  
(518) 434-8112

Dated: Albany, New York  
December 29, 2004

Table of Contents

	<u>Page</u>
I. BACKGROUND OF THE NST AND REFUND OBLIGATION .....	4
II. HISTORY OF THE NEW YORK PROCEEDINGS .....	7
III. THE RULINGS IN NEW YORK STATE CONFLICT WITH AND IGNORE THIS COMMISSION'S BINDING ORDERS AND THE NATIONAL POLICY ESTABLISHED IN THE TELECOM ACT OF 1996, AND SHOULD BE PRE-EMPTED. ....	15
POINT A: The Holdings In The Two Wisconsin Orders Must Be Applied In Determining Whether Verizon's Pre-existing And Current Payphone Rates Comply With The New Services Test. ....	17
POINT B: The RBOC Coalition Letters Of April 10 and 11, 1997, As Codified In The Refund Order, Require Verizon To Be Liable For Refunds Back To April 15, 1997. ....	23
POINT C: Requiring Verizon To Give Refunds Will Not Constitute Unlawful Retroactive Ratemaking. ....	32
IV. PRE-EMPTION OF THE NEW YORK RULINGS IS CONSISTENT WITH, AND REQUIRED BY, STATUTE AND PRECEDENT. ....	34
V. CONCLUSION. ....	37

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
Implementation of the Pay Telephone	)	CC Docket No. 96-128
Reclassification and Compensation Provisions	)	
Of the Telecommunications Act of 1996	)	
	)	
Petition of the Independent Payphone Association	)	
of New York, Inc. to Pre-empt Determinations of	)	
the State of New York Refusing to Implement the	)	
Commission's Payphone Orders, and For a	)	
Declaratory Ruling	)	

**PETITION OF THE INDEPENDENT PAYPHONE ASSOCIATION  
OF NEW YORK, INC. FOR AN ORDER OF PRE-EMPTION AND  
DECLARATORY RULING**

The Independent Payphone Association of New York, Inc. (IPANY), on behalf of its members, respectfully petitions this Commission, pursuant to Sections 1.1 and 1.2 of the Commission's rules, and Section 276 of the Telecommunications Act of 1996, to issue a Declaratory Ruling establishing the rights of Independent Payphone Providers (IPPs) in the State of New York, and to pre-empt rulings of the State of New York which stand in direct conflict to this Commission's Payphones Orders<sup>1</sup> and its

---

<sup>1</sup> *In the Matter of the Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, FCC 96-388, September 20, 1996, 11 FCC Rcd. 20541, ¶¶146-147 ("First Payphone Order"), and Order on Reconsideration, November 8, 1996, 11 FCC Rcd. 21233 ¶¶131, 163 ("Payphone Reconsideration Order") *aff'd in part and remanded in part sub. nom. Illinois Public Telecommunications Assn. v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997) *cert. den. sub nom. Virginia State Corp. Com'n v. FCC*, 523 U.S. 1046 (1998); Order, DA 97-678, 12 FCC Rcd. 20997, ¶¶2, 30-33, 35 (Com. Car. Bur. released April 4, 1997) ("Bureau Waiver Order"); Order DA 97-805, 12 FCC Rcd. 21370, ¶10 (Com. Car. Bur. released April 15, 1997) ("Bureau Clarification Order", also referred to as

Orders in the Wisconsin New Services Test proceedings<sup>2</sup>.

The Orders of this Commission have long required that the RBOCs, including Verizon New York (Verizon), establish rates for underlying payphone services in accordance with the New Services Test (NST). Those Orders have also required that the RBOCs, including Verizon, give refunds to IPPs where such NST-compliant rates were not in effect on April 15, 1997.

Neither of those requirements has been implemented in New York.

For more than seven years, IPANY and its individual members have been vigorously prosecuting proceedings before the New York State Public Service Commission (PSC) and the New York State courts in an effort to obtain NST compliant rates, and to obtain refunds because of Verizon's refusal to establish such NST-compliant rates. IPANY has been frustrated on every occasion by the unwillingness of the PSC, and the New York State courts which reviewed the PSC's Orders, to apply, and acknowledge the validity of, this Commission's Payphone Orders and the two Wisconsin Orders.

Despite the unambiguous rulings of this Commission which required

---

“Refund Order”) (collectively the “*Payphone Orders*”).

<sup>2</sup> In the *Matter of Wisconsin Public Service Commission: Order Directing Filings, Order*, CCB/CPD 00-1, DA 00 347, Released March 2, 2000 (By the Deputy Chief, Comm. Carrier Bureau) (Wisconsin CCB Order); *In the Matter of Wisconsin Public Service Commission: Order Directing Filings*, Bureau/CPD No. 00-01, Memorandum Opinion and Order, FCC 02-25, 17 FCC Rcd. 2051, ¶31 (Jan. 31, 2002) (“Wisconsin Commission Order”) *aff'd sub nom. New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69 rehearing en banc denied (September 22, 2003) (collectively the “Wisconsin Orders”).

Verizon to establish NST-compliant rates by April 15, 1997, and further required that refunds be given back to that date in the event Verizon's rates were found not to be in compliance with the NST, the agencies and courts of New York have refused to apply this Commission's mandates, and have acted in direct contravention of the national policy established by this Commission and Congress. As such, this Commission should pre-empt the New York State determinations pursuant to its general powers of pre-emption, and the specific pre-emption authority (and mandate) contained in Section 276 of the Telecommunications Act of 1996.

In this regard, the relief requested herein against Verizon is directly related to the relief sought in two pending proceedings before this Commission:

- (1) The Illinois Public Telecommunications Association Petition for a Declaratory Ruling filed on July 30, 2004, and
- (2) The Southern Public Communication Association Petition for a Declaratory Ruling filed on November 9, 2004.<sup>3</sup>

In connection with such pre-emption, this Commission should declare that the Wisconsin CCB Order issued on March 2, 2000, was a valid and enforceable Order of this Commission; that both Wisconsin Orders, or at least the Wisconsin Commission

---

<sup>3</sup> This Commission issued a Public Notice (DA 04-2487) on August 6, 2004, requesting comments on the Illinois Petition and a Public Notice (DA 04-3653) on November 19, 2004, requesting comments on the Southern Public Communication Association Petition. Both matters remain pending before the Commission. IPANY is today filing a Motion to Consolidate this Petition with those other Petitions.

Order, must be applied in reviewing the legitimacy of Verizon's tariffs in effect on April 15, 1997; and that the Commission's Payphone Orders and Wisconsin Orders, taken together, mandate that Verizon provide refunds to IPPs, back to April 15, 1997, to the extent that Verizon's NST-compliant payphone rates, when finally established, are less than the pre-existing rates.

## **I. BACKGROUND OF THE NST AND REFUND OBLIGATION**

Beginning with a series of orders dating back to 1996, this Commission required that, by April 15, 1997, Regional Bell Operating Companies, including Verizon, were to establish rates for the underlying pay telephone lines, services and functionalities they provided to Independent Payphone Providers (IPPs) in accordance with the Commission's long-standing New Services Test.<sup>4</sup>

At the same time, the Commission had established its “dial-around compensation” program, pursuant to which operators of public pay telephones would be entitled to receive payment from interexchange carriers which received certain types of calls from these pay telephones.<sup>5</sup>

The RBOCs were extremely anxious to begin receiving lucrative dial-around payments for their own payphones. However, the Commission had ruled the

---

<sup>4</sup> First Report and Order, para. 146, 147; Payphone Reconsideration Order, para. 163 and FN 492; Bureau Waiver Order, para. 2 and FN 5.

<sup>5</sup> First Report and Order, para. 20 et seq.

LECs were not eligible to receive dial-around compensation until they were in actual compliance with the requirement that their underlying payphone rates be priced in accordance with the New Services Test. Bureau Waiver Order, para. 2, 30 and 35; Refund Order, para. 10.

The RBOCs did not want to wait the many months (or perhaps years) before their state tariffs were certified as NST-compliant before they could receive dial-around. Accordingly, they proposed an arrangement with the Commission, pursuant to which (1) the RBOCs would immediately be eligible to receive dial around compensation on April 15, 1997, before their state tariffs were certified as being NST-compliant; (2) the RBOCs would agree to examine their pre-existing state tariffs and, where tariff revisions were necessary to comply with the NST, the RBOCs would file proper NST-compliant tariffs; and (3) if the NST-compliant rates subsequently approved by state commissions were lower than the rates in effect on April 15, 1997, the RBOCs would give refunds, back to April 15, 1997, of the difference. Since it was not certain how long it would take the states to complete the tariff review process, no limit was placed on the duration of the refund period.

This quid pro quo arrangement was set forth in two letters written on behalf of the RBOC Coalition to the Commission on April 10<sup>th</sup> and 11<sup>th</sup>, 1997. (See Exhibit A). Their basic premise was codified in this Commission's Refund Order issued on April 15, 1997:

“The RBOC Coalition also states that 'each LEC will undertake to file with the Commission a written ex parte document, by April 15, 1997, attempting to identify those tariff rates that may have to be revised'. In addition, the RBOC's state that they voluntarily commit 'to reimburse or provide credit to those purchasing the services back to April 15, 1997'...'to the extent that the new tariff rates are lower than the existing rates'”.

Refund Order, para. 14, citing RBOC letter of April 11, 1997.

“The RBOC Coalition and Ameritech have committed, once the new intrastate tariffs are effective, to reimburse or provide credit to its customers for these payphone services from April 15, 1997, if newly tariffed rates, when effective, are lower than the existing rates. This action will help to mitigate any delay in having in effect intrastate tariffs that comply with the guidelines required by the Order on Reconsideration...' A LEC who seeks to rely on the waiver granted in the instant order must also reimburse their customers or provide credit, from April 15, 1997, in situations where the newly tariffed rates are lower than the existing tariffed rates”.

Refund Order, para. 20.

As described further below, Verizon took full advantage of the waiver contained in the Refund Order by waiting until May 19 to file corrections to its New York rates. Verizon also self-certified its compliance with the NST, and immediately began receiving lucrative dial around compensation.<sup>6</sup> Verizon did not, however, live up to its side of the bargain. Instead of honoring its commitments, it falsely claimed its rates were NST compliant; deliberately refused to file NST-compliant rates in New York; but

---

<sup>6</sup> The Commission permitted the RBOCs to self certify that their tariffs complied with the NST, so that they could immediately begin receiving dial-around. Payphone Reconsideration Order, para. 131.

nonetheless received dial-around payments.

## **II. HISTORY OF THE NEW YORK PROCEEDINGS**

IPANY is a not-for-profit trade association representing over 80 IPPs in the State of New York. The overwhelming majority of IPANY members purchase underlying payphone services, consisting of Public Access Lines (PALs), network usage, and various features and functionalities (such as touchtone and fraud blocking) from Verizon. Those services are resold by the IPPs in the course of providing pay telephone service to the general public.

On December 31, 1996, in response to this Commission's initial Payphone Orders, Verizon (then known as New York Telephone Company) filed revisions to certain of its underlying payphone tariffs with the New York PSC, addressing only the rates for the "smart payphone lines" utilized by Verizon's "dumb" payphones. IPANY submitted objections on that filing to the PSC, on the ground no changes were being proposed to the "dumb" payphone line tariffs, which had been in effect for many years, that were used by IPPs for their "smart" payphones.<sup>7</sup>

Verizon made no other state tariff filings by April 15.

On May 19, 1997, Verizon filed additional revisions to its intrastate payphone tariffs, which it admitted were necessary to bring its rates into compliance with

---

<sup>7</sup> Verizon and other RBOC payphone services generally utilize "dumb" telephone instruments and "smart" access lines. In contrast, IPPs use "smart" telephone instruments and "dumb" access lines.

the New Services Test. Critically, Verizon cited this Commission's April 4, 1997, Bureau Waiver Order, and the April 15, 1997, Refund Order, as authority for the state filing. A subsequent Verizon tariff filing, made on July 21, 1997, contained further corrections to payphone service rates, and again cited the New Services Test and the Bureau Waiver Order as its authority.

IPANY again submitted objections to the filings with the PSC, and asked that Verizon be required to provide its cost studies for all payphone services, so that the Commission could review whether Verizon's pre-existing (and unchanged) rates for the payphone services purchased by IPPs were in compliance with the New Services Test.

In response to the tariff filings and IPANY objections, on July 30, 1997, the PSC commenced a proceeding on the validity of Verizon's underlying payphone rates, and whether they complied with federal law.<sup>8</sup> In response thereto, on September 30, 1997, IPANY submitted timely formal comments which showed that Verizon's rates were excessive and unlawful, and urged the PSC to require Verizon to amend its tariffs so that its rates complied with NST's forward looking, direct cost methodology. (See Exhibit B).

The PSC kept its proceeding on Verizon's payphone rates open, but took no action, for more than two years. On December 2, 1999, in an attempt to "jump start" the moribund proceeding, IPANY filed a Petition with the PSC urging it to take final action

---

<sup>8</sup> Cases 96-C-1174 and 93-C-0142, Notice Requesting Comments Addressing Aspects of the Federal Payphone Regulations, the Need for Changes to the Commission's COCOT Regulations and Certain LEC Payphone Tariffs, July 30, 1997.

with respect to the long-pending review of Verizon's tariffs; to declare the pre-existing tariffs unlawful; and to order refunds. (See Exhibit C). In support of that petition, IPANY demonstrated, through the affidavit of its expert, that Verizon's pre-existing rates were established using an embedded cost standard, rather than the forward-looking, direct cost standard mandated by the NST. Among other things, IPANY showed Verizon's rates failed to meet the NST rules because they failed to give credit for the EUCL charge; failed to be applied to usage (as well as to line charges); and improperly imposed excessive overhead allocations.

The PSC started a second proceeding on these issues, but combined it with the original (and still open) proceeding on Verizon's tariff filings. While the PSC proceeding was underway, and before the PSC issued a decision, the Common Carrier Bureau issued its Order of March 2, 2000 in Docket CCB/CPD No. 00-1, the Wisconsin Payphone Proceeding ("the Wisconsin CCB Order"). IPANY immediately brought that Order to the attention of the PSC in the context of Reply Comments filed on March 20, 2000. Therein, IPANY urged the PSC to follow the instructions of the Common Carrier Bureau and, among other things, take into account the EUCL charge, apply the NST to usage, and limit the overhead allocations which could be utilized. (See Exhibit D).

Verizon urged the PSC to ignore the Wisconsin CCB Order, alleging that the methodology it described applied only to the LECs in the State of Wisconsin.<sup>9</sup>

---

<sup>9</sup> Verizon also erroneously asserted that the Wisconsin CCB Order, which had been issued under Delegated Authority, was stayed and of no effect because the RBOCs were

Inexplicably, the PSC bought Verizon's argument, and issued an Order on October 12, 2000, which refused to apply the instructions of the Wisconsin CCB Order; found that Verizon's pre-existing "dumb payphone line" rates complied with the NST; declared the NST did not apply to usage charges; refused to take into account the EUCL charge IPPs were paying; and otherwise rejected all the relief sought by IPANY.<sup>10</sup> (See Exhibit E). Amazingly, the PSC defended Verizon's rates as being NST compliant on the ground they reflected "direct embedded costs plus a reasonable contribution toward common costs and overheads." (Exhibit E, pg. 6).<sup>11</sup>

On December 8, 2000, IPANY submitted a Petition for Rehearing to the PSC, again emphasizing that the PSC was bound to follow the methodology set forth in the Wisconsin CCB Order, because the NST was a nationally applicable standard and not limited to LECs in the State of Wisconsin. Therein, IPANY again urged the PSC to apply the NST to usage rates; to give credit for the EUCL; and to limit Verizon's huge overhead markups. The PSC refused to change its opinion, and on September 21, 2001,

---

appealing to the full Commission. That, of course, was not true. See 47 CFR §1.102(b)(3). Verizon repeatedly made the same argument to the courts, even after its mis-citation had been pointed out, knowing full well the claim was wrong.

<sup>10</sup> Because the PSC found Verizon's rates to be in compliance with the NST, it found no reason to award refunds.

<sup>11</sup> PSC Order of October 12, 2000, Cases 99-C-1684 and 96-C-1174, at page 6. The actual overhead ratios sanctioned by the PSC provided for recovery of at least \$17.26 above the total, unseparated direct cost of the dumb payphone line of \$14.99, and up to 400% above the direct cost of usage.

issued an Order Denying Rehearing. (See Exhibit F).

IPANY then sought judicial review of the PSC Order through an Article 78 proceeding initiated in the State Supreme Court (the trial level court).

While IPANY's appeal was pending before the trial court, this Commission issued its Wisconsin Commission Order on January 31, 2002. That Order was immediately brought to the attention of the trial court, and cited by IPANY as upholding many of the findings and requirements of the Wisconsin CCB Order. Despite its clear relevance to the pending issues, the PSC and Verizon urged the Court to ignore the Wisconsin Commission Order. The trial court issued its initial decision on July 31, 2002, which refused to consider or apply either of the Wisconsin Orders. (See Exhibit G).

However, even without considering the holdings of the two Wisconsin Orders, the trial court was able to hold, based on the earlier Payphone Orders, that the PSC had acted improperly in approving Verizon's pre-existing rates, since they were defended by the PSC as reflecting “direct embedded costs plus a reasonable contribution towards common costs and overhead”, while the Court recognized the NST required use of a forward looking, direct cost methodology. A remand was ordered by the trial court to properly evaluate Verizon’s rates against the NST forward looking standards.

The trial court also ruled, as IPANY had urged, that under the RBOC Coalition letters of April 10 and 11, 1997, and this Commission's Refund Order, Verizon could be liable for refunds if the NST-compliant rate eventually established by the PSC,

during the remand proceeding, were lower than the pre-existing rates as of April 15, 1997.

IPANY and Verizon sought rehearing of the trial court decision, which was denied on April 22, 2003. (See Exhibit H).

Thereafter, both IPANY and Verizon appealed the trial court decision to the Appellate Division. IPANY argued that the Wisconsin CCB Order and the Wisconsin Commission Order did not create new law, but were merely interpretative orders which gave further guidance on how the long-standing NST test was to be applied, and accordingly should be followed by the PSC (and the courts) when establishing correct NST rates.

Verizon argued on appeal that neither the RBOC Coalition letters, nor the Refund Order, required it to make refunds because, Verizon asserted, it never filed any revisions to its pre-existing, non-compliant rates; had not taken advantage of the waiver granted in the Refund Order; and therefore had no obligation to make refunds, even if it did not have NST-compliant rates and even if it had enjoyed millions upon millions of dollars of dial-around compensation since April 15, 1997.<sup>12</sup>

The Appellate Division of the State Supreme Court issued a decision on

---

<sup>12</sup> As discussed above, Verizon was factually wrong in its claim it had not taken advantage of the 45-day waiver. Verizon did not file tariff revisions on April 15, but instead waited until May 19, 1997, to file revisions which Verizon declared were required to make its rates NST compliant. However, those revisions were minor in nature, affecting only a few features, and did not correct the non-NST compliant rates for the “dumb” PAL access lines and usage purchased by IPPs.

March 25, 2004, which was devastating to the IPPs in New York. It held the PSC had no duty to follow the methodology set forth in the Wisconsin CCB Order and Wisconsin Commission Order. Furthermore, it held this Commission's Refund Order did not apply to Verizon, because Verizon had not filed corrective tariffs within the 45 day extension specified in the Refund Order. Finally, the Appellate Court held that even if refunds were to be allowed, the maximum period of liability for refunds could be only 45 days, the length of the waiver period, regardless of how long it took to replace Verizon's unlawful rates with NST-compliant rates. (See Exhibit I). In other words, through its denying reality, gaming the regulatory process, and refusing to honor its commitment to file NST-compliant rates, Verizon would be freed from its moral and legal duty to pay refunds.

Under New York law, IPANY was not automatically entitled to prosecute a further appeal from the Appellate Division's decision. IPANY sought rehearing before the Appellate Division, and permission from both the Appellate Division, and the New York Court of Appeals, to bring a further appeal of the Appellate Division decision. Rehearing and permission to appeal were both denied, and IPANY has no further avenue of appeal under New York law. Thus, the final and binding rulings in New York are:

1. This Commission's Wisconsin CCB Order was not effective when issued, and the NST principles set forth therein did not apply to Verizon, but only to the four largest LECs in Wisconsin;
2. In determining whether Verizon's pre-existing payphone rates complied

with the NST on April 15, 1997 (or at any time before January 31, 2002), neither the PSC nor the courts would be required or allowed to apply the holdings of this Commission in the Wisconsin CCB Order or the Wisconsin Commission Order;

3. The refund obligation set forth in the RBOC Commitment letters, and codified in the Commission's Refund Order of April 15, 1997, only applied where an RBOC actually filed revisions to deficient pre-existing state tariffs by May 19, 1997 (even if the pre-existing rates clearly failed to comply with the NST).
4. Even if a refund were to be available, the maximum duration would be only 45 days (regardless of how long it took to establish NST compliant rates); and
5. IPPs in New York will never be entitled to refunds, even though Verizon has never established NST-compliant rates, and has reaped the benefit of receiving hundreds of millions of dollars of dial-around compensation.<sup>13</sup>

---

<sup>13</sup> The PSC's rationale for not applying the Wisconsin Commission Order is that it had not been issued while the administrative proceedings were being litigated before the PSC. After the trial court refused to apply the Wisconsin Commission Order to the first PSC decision, IPANY once again went back to the PSC and filed an additional petition on March 17, 2003, again urging the PSC to apply the Wisconsin Commission Order. With its procedural and timing objection now unavailable, the PSC commenced another proceeding to look at NST rates, but limited possible relief to a prospective basis only. It has now been 21 months since that additional proceeding was commenced, and the PSC has still not established correct NST compliant rates or even established methodological guidelines as to how it would proceed to set NST rates.

### **III. THE RULINGS IN NEW YORK STATE CONFLICT WITH AND IGNORE THIS COMMISSION'S BINDING ORDERS AND THE NATIONAL POLICY ESTABLISHED IN THE TELECOM ACT OF 1996, AND SHOULD BE PRE-EMPTED**

---

Congress passed §276 of the Telecom Act “to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public.” 47 USC §276(b)(1). In interpreting §276, this Commission has highlighted “Congress’ stated intent to preserve the availability of payphones [and] the universal service functions payphones provide.” Order on Reconsideration, 11 FCC Rcd. 21233, November 8, 1996, at para. 8.

This Commission has continued to implement the requirements of §276. Therein, the Commission confirmed, as did Congress in passing §276, that payphones should be accessible on demand to consumers, and that they “provide a unique back-up communications option when subscription services - whether wireline or wireless - are unaffordable or unavailable” and that “payphone services are particularly critical to those with few other communications service options - including low-income customers, the elderly, and residents of rural areas.” Critical to public policy, the Commission has affirmatively stated “Payphones also enhance access to emergency (public health and safety) services.” Dial-Around Update Order, at para. 20.<sup>14</sup>

Section 276(c) of the Telecom Act provides that, “to the extent that any

---

<sup>14</sup> In the Matter of Request to Update Default Compensation Rate for Dial-Around Calls from Payphones, WC Docket 03-225, Report and Order, FCC 04-182, August 12, 2004 (“Dial-Around Update Order”).

state requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall pre-empt such state requirements”.

This Commission has already determined that it will pre-empt any state action inconsistent with the FCC's payphone orders. Report and Order, para. 147; Order on Reconsideration, 11 FCC Rcd. 21233 at 21328 (para. 218), and it has done so on several occasions. See, for example, In the Matter of New England Public Communications Council Petition for Pre-emption Pursuant to Section 253, Docket 96-11, Memorandum, Opinion and Order, FCC 96-470, December 10, 1996, 1996 WL 709132.<sup>15</sup>

Regrettably, the agencies of the State of New York have refused to implement this Commission's Payphone Orders, and have adopted rules which fly in the face of the relief ordered by this Commission.

Those rules not only ignore, but actually undercut, this Commission's policy, and the policy of Congress, to “promote the widespread deployment of payphone services to the benefit of the general public”. Moreover, as shown below, those rulings are wrong on both the facts and the law. As such, the actions of the State of New York should be pre-empted and set aside by this Commission, as it has already done with respect to other erroneous state decisions, as required by §276 of the Telecom Act, and

---

<sup>15</sup> Therein, pre-emption was ordered by this Commission under both §253 and §276, on the ground the Connecticut DPUC had taken action “inconsistent with the terms, tenor and purpose of Section 276 and our implementing rules”. (Memorandum, Opinion and Order, at para. 26-29).

the Supremacy Clause of the United States Constitution.

Upon such pre-emption, this Commission should enforce its Payphone Orders against Verizon; determine NST-compliant rates for Verizon; and either require Verizon to make refunds back to April 15, 1997, or alternatively, to forfeit all of the dial-around compensation Verizon has received since that date.

**POINT A: The Holdings In The Two Wisconsin Orders Must Be Applied In Determining Whether Verizon's Pre-existing And Current Payphone Rates Comply With The New Services Test**

The New York PSC refused to apply the Wisconsin Orders for three reasons. First, it argued the Wisconsin CCB Order, by its terms, only applied to LECs in Wisconsin, and had no application to the manner in which Verizon was required to establish NST rates in New York. Second, the PSC asserted that since the Wisconsin Commission Order was issued after the PSC upheld Verizon's pre-existing rates, it should be ignored. Third, the PSC asserted that both the Wisconsin CCB Order, and the Wisconsin Commission Order, created “new law”, and accordingly could not be followed without violating the prohibition on retroactive ratemaking and the Filed Tariff Doctrine.

Each of those holdings is wrong as a matter of law, and directly conflicts with this Commission's rulings. As such, they should be pre-empted and set aside.

First, there can be no serious doubt the Wisconsin CCB Order was generally applicable wherever NST rates were to be established. But seizing on purely procedural language, the PSC refused to apply it to Verizon.

The first paragraph of the Wisconsin CCB Order directed “the four largest incumbent local exchange carriers in Wisconsin” to submit to the Commission for review their currently effective tariffs for intrastate payphone service offerings. Paragraph 13 of the Wisconsin CCB Order stated “At this time, this Order applies only to the LECs in Wisconsin specifically identified herein.”

Verizon and the PSC seized on this language as an excuse to claim the NST criteria, as explained in the Wisconsin CCB Order, somehow applied only in Wisconsin, and not to the other 49 states. But that is not why that language was used.

Because the Wisconsin Commission had declined to review the rates of any of the many ILECs in the state, the task fell to this Commission under §276(b)(1). However, not wishing to be overwhelmed at the outset, the Common Carrier Bureau decided to start with the four largest carriers. Thus, only those largest carriers were initially instructed to submit their tariffs.

In order to avoid confusion and delay in that review process, the Common Carrier Bureau provided guidance, in advance, on “the methodological principles applied under Computer III and other relevant FCC proceedings addressing the application of the New Services Test and cost-based ratemaking principles to services and facilities offered by incumbent LECs to providers of services that compete with incumbent LEC services.” Wisconsin CCB Order, para. 8. Nowhere was there any indication that those “methodological principles” applied only in the State of Wisconsin. Instead, the Common

Carrier Bureau was delineating a generally applicable “roadmap” which reaffirmed the long standing principles which had long been applicable to all ILECs for complying with the New Services Test.

The New Services Test is a national standard, arises from this Commission's nationally applicable Computer III and ONA rules, and is equally binding on all state commissions and all RBOCs. The standard is not applied one way in one state and a different way in a different state; instead, the methodology applies equally to rates set by all RBOCs in all states. Accordingly, the FCC’s instructions to the “four largest Wisconsin LECs” for complying with the nationwide New Services Test are identical to the requirements for complying with the New Services Test applicable to Verizon, all other RBOCs, and all state commissions.<sup>16</sup>

Second, Verizon asserted (and the PSC agreed) that the Wisconsin CCB Order, which had been issued by the Deputy Chief of the Common Carrier Bureau, was not an “official” Order of the FCC; was not effective when issued; and was otherwise improper because it was inconsistent with prior FCC orders. That argument had no merit. The Commission frequently acts through delegated authority, and orders issued by the Common Carrier Bureau, under delegated authority, are effective and binding unless and until either stayed or set aside by the full Commission. The fact a party has filed an

---

<sup>16</sup> The New York trial court agreed the Wisconsin CCB Order was not limited to LECs in Wisconsin, and was applicable to all states. (Supreme Court Decision of July 31, 2002, Ex. G, at pg. 17, fn. 2). That holding was challenged by Verizon on appeal, and reversed.

Application for Review of a Common Carrier Bureau Order does not affect the effectiveness of that Order.<sup>17</sup>

The New York courts also bought Verizon's claim, thus establishing a rule in New York that Commission orders issued pursuant to delegated authority can be willfully disobeyed by carriers in New York if they simply file appeals to the full Commission. That is a holding this Commission cannot allow to stand.<sup>18</sup>

Third, the PSC and the New York courts improperly refused to apply the Wisconsin Commission Order while this matter was under appeal.

The PSC refused to follow the holdings of the Wisconsin Commission

---

<sup>17</sup> See 47 USC § 0.203(a) of the FCC's rules: "The person...to which functions are delegated shall, with respect to such functions, have all the jurisdiction, powers and authority conferred by law upon the Commission..."; 47 CFR §0.203(b): "Except as provided in §1.102 of this chapter, any action taken pursuant to delegated authority shall have the same force and effect and shall be made, evidenced, and enforced in the same manner as actions of the Commission"; 47 CFR §1.102(b): "Non-hearing or interlocutory actions taken pursuant to delegated authority shall, unless otherwise ordered by the designated authority, be effective upon release of the document containing the full text of such action..."; 47 CFR §1.102(b)(3): "If an application for review of a non-hearing or interlocutory action is filed...the Commission may in its discretion stay the effect of any such action until its review of the matters at issue has been completed." (emphasis added). The BOCs did in fact ask the full FCC to issue such a stay, but it was never granted.

<sup>18</sup> Verizon knew, at all times, its claim to the New York courts was wrong. Verizon deliberately and repeatedly cited 47 CFR §1.102(a)(3), which provides for a stay under appeal but only for actions covered by 47 CFR §1.102(a)(1), i.e., to "final decisions of a commissioner, or panel of commissioners following review of an initial decision..." The Wisconsin CCB Order was not one of those types of orders, but was instead a non-hearing action taken pursuant to Delegated Authority. Thus, the Wisconsin CCB Order was governed by 47 CFR §1.102(b)(3), which, as indicated above, was effective upon issuance, and remained effective unless, while on appeal, the Commission issued a stay. That did not happen, and in fact the Commission actually denied a stay. See Wisconsin Commission Order, para. 1.

Order on the ground it was issued after the PSC had upheld Verizon's rates (even though the matter remained on appeal). The trial court refused to apply it because it had not been issued by April 15, 1997, when Verizon was obligated to have in effect NST-compliant rates.

That is not a correct application of the law.

Instead, because the Wisconsin Commission Order was issued while the PSC's decision was on appeal before the trial court, the trial court should have either ordered a remand or applied the Wisconsin Commission Order itself as the most recent statement of the law.

In reviewing challenges to an order issued by the California Public Utility Commission, the Ninth Circuit, citing US West v. Jennings, addressed the issue as follows:

“Thus, if any ruling or directive in the FCC Remand Order or other regulations issued by the FCC after the CPUC issued its decision rendered the CPUC's decisions violative of the Act, we would apply the new regulations and invalidate the CPUC's Orders. (emphasis added).

Pacific Bell v. Pac-West Telecomm, Inc., 325 F.3d 1114 at 1130.

New York's refusal to apply the Wisconsin Commission Order is in direct conflict with what happened (correctly) in Michigan. There, the Supreme Court of